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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KASEY HEFLIN,

Plaintiff and Respondent,

v.

DENISE SMITH,

Defendant and Appellant.

B302212

(Los Angeles County
Super. Ct. No. 19WHR001306)

APPEAL from an order of the Superior Court of Los Angeles County. Daniel P. Ramirez, Judge. Affirmed. Kenneth H. Lewis, for Defendant and Appellant. Kasey Heflin, in pro. per., for Plaintiff and Respondent.

Appellant Denise Smith failed to appear at a hearing at which the trial court granted a restraining order against her. She subsequently filed a request to set aside the order under Code of Civil Procedure section 473, subdivision (b) (section 473(b)), on the basis that she missed the hearing due to a calendaring mistake. The court denied the request after finding Smith failed to prove she actually made a mistake. Smith appealed, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2019, Kasey Heflin filed a request for a permanent restraining order against Smith, who is her neighbor. The court granted the restraining order at a July 24, 2019 hearing. Smith failed to appear at the hearing.

The next day, Smith filed a request, pursuant to section 473(b), to set aside the restraining order and set a new hearing. In a declaration attached to her request, Smith claimed she failed to appear at the hearing because she erroneously marked on her calendar that the hearing was on July 25, rather than July 24. When she went to court on July 25, the clerk told her the hearing had taken place the previous day. Smith also claimed she could provide evidentiary support for her contentions.

At the subsequent hearing to consider the request, Smith reiterated that she missed the original hearing because she had marked the wrong date on her calendar. The court asked if she had evidentiary support for that claim, such as the calendar or a photograph of the calendar. Smith replied that she did not.

Heflin urged the court to deny Smith's request. She told the court that, sometime around July 11, 2019, Smith filed her own request for a restraining order against Heflin. In that request, Smith correctly referenced the July 24 hearing date.

Smith also failed to appear at a subsequent hearing related to the request. In response, Smith explained that a lawyer advised her not to go to the hearing because she had not served Heflin.

The court found Smith did not meet her burden of showing a mistake by a preponderance of the evidence, noting her failure to provide any evidence to substantiate her claims. Accordingly, it denied Smith's requests to set aside the restraining order and set a new hearing. Smith timely appealed.

DISCUSSION

On appeal, Smith contends the trial court abused its discretion in declining to set aside the restraining order under section 473(b), because her request was timely, would not have prejudiced Heflin, and provided a sufficient excuse for missing the hearing. We disagree.

Under section 473(b), a court has discretion to relieve a party from an order taken against her through her "mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) The complaining party has the burden of establishing entitlement to relief by a preponderance of the evidence. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1423.) "[I]f a party fails to show that a judgment [or order] has been taken against him through his mistake, inadvertence, surprise or excusable neglect the court may not grant relief. It has no discretion.'" (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1042 (*Parage*).)

A trial court's decision on a motion to set aside an order under section 473(b) will not be disturbed on appeal absent a clear showing of abuse of discretion. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.) We must defer to the trial court's credibility assessments and accept the "court's factual finding that there *was* no mistake unless there is

no substantial evidence to support it.” (*McClain v. Kissler* (2019) 39 Cal.App.5th 399, 418 (*McClain*); see *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1007.)

Here, the trial court denied Smith’s request after finding she had not proven her failure to appear at the original hearing was due to a mistake. Given Smith did not produce any evidence corroborating her claim that she made a calendaring error—despite her earlier assertion that she had such evidence—this was essentially a credibility assessment, which we will not second guess on appeal. (*McClain, supra*, 39 Cal.App.5th at p. 418.) The trial court’s factual finding on this issue precluded it from granting relief under section 473(b). (*Parage, supra*, 60 Cal.App.4th at p. 1042.) This is true regardless of whether Smith’s request was timely, would not have prejudiced Heflin, or provided a sufficient excuse. The trial court did not abuse its discretion in denying Smith’s request.

Smith points us to several cases in which courts have held that calendaring errors, or similar mistakes, provided sufficient grounds for granting relief under section 473(b) and comparable statutes. (See, e.g., *Haviland v. Southern California Edison Co.* (1916) 172 Cal. 601; *Nicol v. Davis* (1928) 90 Cal.App. 337; *Weck v. Sucher* (1929) 96 Cal.App. 422; *Nilsson v. Los Angeles* (1967) 249 Cal.App.2d 976; *Flores v. Board of Supervisors* (1970) 13 Cal.App.3d 480; *Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116.) She overlooks, however, that in those cases there was no question the moving parties had made mistakes, and the only issue was whether the mistakes warranted relief. Here, in contrast, the trial court found Smith failed to sufficiently prove she made a mistake. That factual

finding, which Smith does not directly challenge, was fatal to her request.

DISPOSITION

We affirm the order. Respondent is awarded costs on appeal.

BIGELOW, P. J.

WE CONCUR:

GRIMES, J.

WILEY, J.